

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

(Class Action)
SUPERIOR COURT

NO: 500-06-000891-172

MARYSE NICOLAS, [REDACTED]
[REDACTED]

Representative Plaintiff

vs.

VIVID SEATS LLC, legal person having its principal office at 111 North Canal Street, Suite 800, Chicago, Illinois, United States of America, 60606

Defendant

ORIGINATING APPLICATION
(Articles 141 and 583 C.C.P.)

THE REPRESENTATIVE PLAINTIFF RESPECTFULLY STATES THE FOLLOWING:

I. INTRODUCTION

1. This class action seeks the reimbursement of the amounts that Defendant Vivid Seats LLC (hereinafter "Vivid") unlawfully charged Class members for purchases made on its websites and mobile applications for shows or sporting events, in violation of sections 54.4(h), 219, 224(c) and 228 of Quebec's *Consumer Protection Act* (the "CPA"), as well as punitive damages for the exploitation of Quebec consumers;
2. On September 6th, 2018, the Honourable Justice Benoît Moore, J.S.C., authorized the Representative Plaintiff to bring a class action for the benefit of the persons forming part of the group hereinafter described, namely:

English:

All consumers within the meaning of the Quebec's *Consumer Protection Act* who purchased a ticket from Vivid Seats web site or application since November 16th, 2014;

French:

Tous les consommateurs au sens de la *Loi sur la protection des consommateurs* qui ont acheté un billet à partir du site ou de l'application portable de Vivid Seats depuis le 16 novembre 2014;

3. The Honourable Justice Moore appointed the status of Representative Plaintiff to Ms. Maryse Nicolas and identified the principal questions of fact and law to be dealt with collectively in the class action as follows:

English:

- a) Did Vivid violate s. 54.4(h) C.P.A.?
- b) Did Vivid violate ss. 219, 224 and 228 C.P.A.?
- c) If there has been a violation of one or more of these provisions, can the members of the class action claim compensatory and punitive damages from Vivid? If so, in what amount?

French:

- a) Vivid a-t-elle violé l'article 54.4(h) de la *L.P.C.* ?
- b) Vivid a-t-elle violé les articles 219, 224 et 228 de la *L.P.C.* ?
- c) En cas de violation d'une ou plusieurs de ces dispositions, les membres du groupe peuvent-ils réclamer des dommages compensatoires et punitifs à Vivid ? Si oui, pour quel montant ?

II. THE PARTIES

- 4. The Representative Plaintiff is a consumer within the meaning of the CPA;
- 5. The Defendant, Vivid Seats LLC, operates websites, mobile applications and call centers where consumers can purchase tickets to shows and sporting events on the secondary market for events held in the province of Quebec and elsewhere around the world;
- 6. Vivid is a merchant within the meaning of the CPA and its activities are governed by this legislation, among others;
- 7. Although not physically located in Quebec (its head office is in Chicago, IL), Vivid's online presence enables it to enter into distance contracts with consumers and thus carry on business in the province of Quebec;

III. BACKGROUND

8. On its main website (www.vividseats.com) and the “Vivid Seats” mobile application, Vivid – up until very recently – failed in its obligation to disclose the currency in which amounts owing under the distance contract are payable (if not Canadian dollars), for financial gains;
9. On September 6th, 2018, during the authorization hearing, counsel for Vivid admitted that Vivid had modified its business practice at some point after Ms. Nicolas filed her *Application to Authorize the Bringing of a Class Action*, without specifying the exact date on which such change took place;
10. The modification made by Vivid is that it now displays the American dollars currency at the first step of the purchase process, which it failed to do at the time of Ms. Nicolas’ purchase on its website;
11. Prior to the practice change at some point in 2018, Vivid contracted with Class members (by selling them tickets to events both in Quebec and outside of Quebec) by advertising a price that did not – prominently – indicate that the currency is in American dollars and then charged Class members in American dollars;
12. Vivid misled Class members by giving them the impression that they are contracting in Canadian dollars, but then charged them in American dollars;
13. Since the beginning of the Class period until the filing of Ms. Nicolas’ *Application to Authorize the Bringing of a Class Action*, the American dollar was worth approximately 29.3% more than the Canadian dollar, the Representative Plaintiff disclosing a chart with data obtained from the Bank of Canada website containing the monthly average USD/CAD exchange rates from November 2014 to October 2017 as **Exhibit P-1**;
14. The damages to Class members are thus equal to 29.3% of Vivid’s gross sales to Class members from November 16th, 2014 until the practice change in 2018, in addition to their claim for punitive damages;
15. The Representative Plaintiff assumes that Vivid has generated gross sales in the tens of millions of dollars during the Class period – an allegation which Vivid did not contest at authorization;
16. Quebec consumer law is a matter of protective public order and by engaging in these sales tactics, Vivid violated sections 54.4(h), 219, 224 and 228 CPA;
17. In the Representative Plaintiff’s submission, it is obvious that Vivid willfully engaged in the abovementioned prohibited business practices as a means of unlawfully profiting from Class members ignorance and inattentiveness and would have continued doing so but for Ms. Nicolas filing the present class action;

IV. THE REPRESENTATIVE PLAINTIFF'S PERSONAL EXPERIENCE

18. On October 12th, 2017, Ms. Nicolas and her partner were looking to purchase tickets to the concert of the famous singer "P!NK" scheduled for March 23rd, 2018 at the Bell Centre in Montreal, Quebec;
19. To begin their search, Ms. Nicolas and her partner Googled "*Pink beautiful trauma tour montréal mars 2018*", as it appears from a simulation of the purchase process disclosed as **Exhibit P-2**;
20. As it appears from Exhibit P-2, Vivid appears at the top of Google's search engine because Vivid pays Google to list Vivid's site based on certain key AdWords (AdWords is an online advertising service developed by Google, where advertisers such as Vivid pay to display brief advertising copy, product listings, and video content within the Google ad network to web users);
21. Ms. Nicolas clicked on Vivid's advertisement that appeared in Google's search results and was directed to Vivid's website with the heading "Pink Tickets", with the subheading "Events near CAN – QC – Montreal" (Exhibit P-2 at page 2);
22. Ms. Nicolas clicked on the red "Tickets" button for the P!NK concert at the Bell Centre in Montreal on March 23rd, 2018 (hereinafter the "**Pink Concert**");
23. Ms. Nicolas is then on a webpage displaying the seating chart and inventory of tickets being sold by Vivid for the Pink Concert, which also displays the prices, but never indicates that the currency displayed is in American dollars (even though the event is being held in Canada and the vast majority of attendees are Canadian);
24. Ms. Nicolas assumed that the prices advertised by Vivid for an event at the Bell Centre in Montreal, Canada, were in Canadian dollars. Ms. Nicolas assumed this because this is the general impression given to her by Vivid (see, for instance, Exhibit P-2 at page 3);
25. Ms. Nicolas selected the tickets she wished to purchase (floor seats in row AA) and then completed the purchase process with Vivid;
26. The "Order Summary" section of the "Checkout" page (Exhibit P-2 at page 6) shows the total price, without indicating that Vivid will be charging Ms. Nicolas' credit card in American dollars;
27. Ms. Nicolas agreed to pay Vivid \$978.58 Canadian dollars;
28. On October 12th, 2017, Vivid sent Ms. Nicolas an email to confirm her order for a total of \$978.58 (including fees), as it appears from **Exhibit P-3**;
29. Ms. Nicolas thought she was making a purchase for \$978.58 Canadian dollars based on the general impression given to her by Vivid throughout the purchase process;

30. On October 24th, 2017, Ms. Nicolas received her credit card statement showing that Vivid in fact charged her \$978.58 USD, which is equal to \$1,250.37 CAD (which is 27.77% more than the price Vivid advertised on its website), as it appears from **Exhibit P-4**;
31. Ms. Nicolas' damages in the amount of \$271.79 are a direct and proximate result of Vivid's misconduct;
32. Vivid will try, once again, to argue that its very subtle disclosure in the fine print at the last step of its purchase process should suffice to exonerate it from liability (see Exhibit P-2 at page 7);
33. Vivid's disclosure in the fine print, which neither Ms. Nicolas nor her partner ever saw, contravenes section 54.4 al. 2 CPA, which provides that Vivid must present the transaction's currency *prominently* and in a comprehensible manner and bring it *expressly* to Ms. Nicolas' attention, which it intentionally did not do;
34. Moreover, Vivid does not mention anywhere in its Sales Terms and Conditions that its prices are advertised and charged in American dollars, Ms. Nicolas disclosing **Exhibit P-5**;
35. Vivid's representations concerning the tickets' price is also false and misleading, in violation of sections 219 and 224(c) CPA, because Vivid charged Ms. Nicolas' credit card a higher price than it advertised;
36. Vivid also fails in its obligation to mention an important fact, namely that the price charged is in American dollars, in violation of section 228 CPA;
37. It is worth noting that – during the Class period – both StubHub and Ticketmaster (Vivid's main industry competitors), clearly indicate to consumers that their prices are listed in American dollars from the very first step, Ms. Nicolas disclosing *en liasse* pricing charts for StubHub and Ticketmaster as **Exhibit P-6**;
38. Not only did Vivid fail in its obligations under the CPA, but it also gained an unfair advantage against its main competitors who appear to comply with section 54.4(h) CPA;
39. As a result of the foregoing, Ms. Nicolas is justified in claiming, for herself and on behalf of Class members, compensatory damages, as well as punitive damages based on repeated violations of sections 54.4(h), 219, 224(c) and 228 CPA (pursuant to section 272 CPA);
40. Ms. Nicolas is accordingly entitled to claim and does hereby claim from Vivid the aggregate of the sum of the difference between the higher Canadian dollar price charged to Class members by Vivid and the lower American dollar price advertised by Vivid;

V. VIVID'S LIABILITY

- 41. Vivid created, participated in, facilitated, marketed, designed, implemented, collected payment for and profited from the commission of an illegal practice against Class members for its own financial gain;
- 42. At all relevant times, Vivid did not prominently display the American currency to Class members, as it appears from Exhibit P-2 (which is what the Vivid website displayed to Class members from November 16th, 2014 until the practice change in 2018);
- 43. For an illustration of the CPA violations on Vivid's mobile application from November 16th, 2014 until the practice change in 2018, Ms. Nicolas discloses herewith screen captures of Vivid's mobile application on November 13th, 2017 as **Exhibit P-7**;
- 44. The modifications made by Vivid at some point in 2018 to both its website, disclosed as **Exhibit P-8** and to its mobile application, disclosed as **Exhibit P-9**, are an admission on the part of Vivid as to its heretofore illegal conduct in the province of Quebec and an attempt to mitigate its damages in the present class action;
- 45. Both Exhibit P-8 and Exhibit P-9 prove that Vivid modified the way it displays the American currency for the very same Pink Concert that Ms. Nicolas purchased tickets to in Montreal, Quebec (at the Bell Centre);
- 46. The following chart can assist this Honourable Court to see the obvious differences in the American currency disclosure before and after Ms. Nicolas filed her class action (on both Vivid's website and mobile application):

	Before Class Action Filed (November 16, 2014 to 2018)	After Class Action Filed (after 2018 practice change)
Vivid's website	Exhibit P-2	Exhibit P-8
Vivid's mobile application	Exhibit P-7	Exhibit P-9

- 47. By acting in this unlawful manner, Vivid also gained an unfair advantage over its competitors such as StubHub and Ticketmaster, both of whom prominently displayed the American currency to Class members (see Exhibit P-6);
- 48. It also appears that Vivid engaged in the prohibited practice acting as an agent of sorts for other secondary market ticket websites such as www.Tickets-Center.com, the whole as it appears *en l'iasse* from a letter and documents prepared by a Class member in February 2018, disclosed herewith as **Exhibit P-10**;

49. Vivid failed to fulfill the obligations imposed on it by Title I and Title II of the CPA, notably sections 54.4(h), 219, 224 and 228 and are thus liable to Class members pursuant to section 272 CPA;

VI. COMPENSATORY DAMAGES

50. Ms. Nicolas benefits from an absolute presumption of prejudice for the \$271.79 she overpaid to Vivid;
51. For a violation of the CPA, the Supreme Court has already ruled that a merchant cannot argue the “absence of prejudice” to defend against a consumer whose rights under the CPA were violated;
52. Therefore, Ms. Nicolas and Class members benefit from an absolute presumption of prejudice in this case;
53. The prejudice is also the affront suffered because of a violation of Class members’ rights under the CPA;
54. Ms. Nicolas hereby seeks compensation in the amount of \$271.79 caused by a direct result of Vivid’s disregard for sections 54.4(h), 219, 224 and 228 CPA (therefore her damages are a direct result of Vivid’s misconduct);

VII. PUNITIVE DAMAGES

55. Vivid’s overall conduct before, during and after the violation was lax, careless, passive and ignorant with respect to consumers’ rights and to its own obligations;
56. The violation was ongoing for at least 3 years – likely even more – and it was only after a Quebec consumer filed a class action did Vivid finally modify its practice;
57. Vivid could not plead that it was unaware because its main competitors, StubHub and Ticketmaster did prominently display the currency to Class members during the same period (see Exhibit P-6);
58. In this case, Vivid breached consumer protection legislation in Quebec without any explanation, for a significant period;
59. This complete disregard for consumers’ rights and to its own obligations under the CPA is in and of itself an important reason for this Court to enforce measures that will punish Vivid, as well as deter and dissuade others from engaging in similar reprehensible conduct to the detriment of Quebec consumers;
60. The reality is that Vivid has likely generated millions of dollars in profits during the Class period by charging Class members 29.3% more than the price it advertised (the allegation containing these estimates was not contested at authorization);

61. Punitive damages have a preventive objective, that is, to discourage the repetition of such undesirable conduct;
62. An example of the egregiousness of Vivid's conduct is explained in an article published in La Presse on June 1, 2017 titled "*Obama à Montréal: jusqu'à 1800 \$ pour des billets en revente*", disclosed herewith as **Exhibit P-11**;
63. By all accounts, Vivid's violations are intentional, calculated, malicious and vexatious;
64. Ms. Nicolas is accordingly entitled to claim and does hereby claim on behalf of Class members from Vivid \$100.00 per Class member on account of punitive damages;
65. Vivid's patrimonial situation is so significant that the foregoing amount of punitive damages is appropriate in the circumstances;

VIII. THE PERSONAL CLAIMS OF EACH OF THE CLASS MEMBERS AGAINST VIVID:

66. Vivid failed to display the American dollar currency - at the first several steps of the purchase process on its website and mobile application - to any Class member purchasing tickets using the Vivid website or mobile application during the Class period;
67. Vivid further failed to *prominently* display the American dollar currency - at the final step of the purchase process on its website and mobile application - to any Class member contracting with Vivid;
68. Every Class member purchased a ticket from Vivid's website or mobile application prior to Vivid modifying its practice at some point in 2018;
69. All Class members were entitled to expect that Vivid respect the law, especially one that is of public order;
70. Vivid took advantage of the credulousness of Class members, causing them financial losses which they now wish to recuperate;
71. As a result of Vivid's unlawful practice, each Class member paid an average of 29.3% more for their respective tickets and is presumed to have suffered a prejudice as a result of Vivid's prohibited practice;
72. All of the damages to the Class members are a direct result of Vivid's misconduct;
73. By reason of Vivid's unlawful conduct, the Representative Plaintiff and Class members have suffered damages, which they may collectively claim against Vivid;

74. The Representative Plaintiff is accordingly entitled to claim and does hereby claim from Vivid the following as damages on behalf of each Class member:
- a) Reimbursement in the amount of the 29.3% overcharged by Vivid (using the theory of averages applicable in class action recovery);
 - b) Punitive damages in the amount of \$100.00 per Class member.
75. The damages sustained by the Class members flow, in each instance, from a common nucleus of operative facts, namely, Vivid failing in its legal obligation to prominently display the American dollar currency when contracting with Class members.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

1. **GRANT** the Representative Plaintiff's action against Defendant on behalf of all the Class members;
2. **CONDEMN** the Defendant to pay the Representative Plaintiff and Class members compensatory damages in the aggregate overcharged amount being 29.3% of Defendant's gross sales to Class members;
3. **ORDER** the collective recovery of all damages owed to the Class members for the amounts overcharged by the Defendant;
4. **CONDEMN** the Defendant to pay to each Class member the sum of \$100.00 on account of punitive damages, and **ORDER** collective recovery of these sums;
5. **CONDEMN** the Defendant to pay interest and the additional indemnity on the above sums according to law from the date of service of the *Application to Authorize the Bringing of a Class Action*;
6. **ORDER** the Defendant to deposit in the office of this Court the totality of the sums which forms part of the collective recovery, with interest and costs;
7. **ORDER** that the claims of individual Class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;
8. **CONDEMN** the Defendant to bear the costs of the present action at all levels, including the cost of all exhibits, notices, the cost of management of claims and the costs of experts, if any, including the costs of experts required to establish the amount of the collective recovery orders;

9. **RENDER** any other order that this Honourable Court shall determine;

Montreal, February 25th, 2019

(s) LPC Avocat Inc.

LPC AVOCAT INC.

Me Joey Zukran

Attorney for Representative Plaintiff

SUMMONS
(ARTS. 145 AND FOLLOWING C.C.P.)

TO: VIVID SEATS LLC
111 North Canal Street, Suite 800
Chicago, Illinois, 60606, U.S.A

Filing of a judicial application

Take notice that the Representative Plaintiff has filed this Originating Application in the office of the Superior Court in the judicial district of **Montreal**.

Defendant's answer

You must answer the application in writing, personally or through a lawyer, at the courthouse of Montreal situated at **1, Rue Notre-Dame E, Montréal, Quebec, H2Y 1B6**, within 15 days of service of the Application or, if you have no domicile, residence or establishment in Québec, within 30 days. The answer must be notified to the Representative Plaintiff's lawyer or, if the Representative Plaintiff is not represented, to the Representative Plaintiff.

Failure to answer

If you fail to answer within the time limit of 15 or 30 days, as applicable, a default judgement may be rendered against you without further notice and you may, according to the circumstances, be required to pay the legal costs.

Content of answer

In your answer, you must state your intention to:

- negotiate a settlement;
- propose mediation to resolve the dispute;
- defend the application and, in the cases required by the Code, cooperate with the Representative Plaintiff in preparing the case protocol that is to govern the conduct of the proceeding. The protocol must be filed with the court office in the district specified above within 45 days after service of the summons or, in family matters or if you have no domicile, residence or establishment in Québec, within 3 months after service;
- propose a settlement conference.

The answer to the summons must include your contact information and, if you are represented by a lawyer, the lawyer's name and contact information.

Change of judicial district

You may ask the court to refer the originating application to the district of your domicile or residence, or of your elected domicile or the district designated by an agreement with the Representative Plaintiff.

If the application pertains to an employment contract, consumer contract or insurance contract, or to the exercise of a hypothecary right on an immovable serving as your main residence, and if you are the employee, consumer, insured person, beneficiary of the insurance contract or hypothecary debtor, you may ask for a referral to the district of your domicile or residence or the district where the immovable is situated or the loss occurred. The request must be filed with the special clerk of the district of territorial jurisdiction after it has been notified to the other parties and to the office of the court already seized of the originating application.

Transfer of application to Small Claims Division

If you qualify to act as a plaintiff under the rules governing the recovery of small claims, you may also contact the clerk of the court to request that the application be processed according to those rules. If you make this request, the plaintiff's legal costs will not exceed those prescribed for the recovery of small claims.

Calling to a case management conference

Within 20 days after the case protocol mentioned above is filed, the court may call you to a case management conference to ensure the orderly progress of the proceeding. Failing this, the protocol is presumed to be accepted.

Exhibits supporting the application

In support of the Originating Application, the Representative Plaintiff intends to use the following exhibits:

EXHIBIT P-1: Copy of the chart from the Bank of Canada website with the monthly average USD/CAD exchange rates from November 2014 to October 2017;

EXHIBIT P-2: Copy of simulation of Ms. Nicolas' purchase process;

EXHIBIT P-3: Copy of order confirmation from Vivid to Ms. Nicolas on October 12th, 2017;

EXHIBIT P-4: Copy of Ms. Nicolas' October 2017 credit card statement;

EXHIBIT P-5: Copy of Vivid's Sales Terms and Conditions;

EXHIBIT P-6: *En liasse*, copies of pricing displayed by StubHub and Ticketmaster;

EXHIBIT P-7: *En liasse*, screen captures of Vivid Seats' mobile application taken November 13, 2017;

EXHIBIT P-8: *En liasse*, screen captures of Vivid Seats' website taken in 2018, following the modification to the Vivid Seats website;

EXHIBIT P-9: *En liasse*, screen captures of Vivid Seats' mobile application in 2018, following the modification to the Vivid Seats mobile application;

EXHIBIT P-10: *En liasse*, copies of letters and documents sent by Ms. Patricia Forbes to Class counsel in February of 2018;

EXHIBIT P-11: Copy of La Presse article titled "*Obama à Montréal: jusqu'à 1800 \$ pour des billets en revente*", published June 1, 2017, by Louis-Samuel Perron.

The exhibits in support of the application are available on request.

Notice of presentation of an application

If the application is an application in the course of a proceeding or an application under Book III, V, excepting an application in family matters mentioned in article 409, or VI of the Code, the establishment of a case protocol is not required; however, the application must be accompanied by a notice stating the date and time it is to be presented.

Montreal, February 25th, 2019

(s) LPC Avocat Inc.

LPC AVOCAT INC.

Me Joey Zukran

Attorney for Representative Plaintiff

500-06-000891-172

(Class Action)
SUPERIOR COURT
DISTRICT OF MONTREAL

MARYSE NICOLAS, [REDACTED]
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Representative Plaintiff

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Defendant

ORIGINATING APPLICATION
(Articles 141 and 583 C.C.P.)
Nature of Suit: Damages

ORIGINAL

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N/D: JZ-171
